Salutary Avenue (M) Sdn Bhd v Malaysia Shipyard & Engineering Sdn Bhd & Anor

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24-690 OF 1998
ABDUL MALIK ISHAK J
10 MARCH 1999

Arbitration *— Arbitrator — Appointment — Inherent defects in plaintiff's notice — Whether plaintiff had given proper notice to defendant — Whether arbitrator should have some knowledge in the subject matter of the dispute — Arbitration Act 1952 s 12*

The first defendant, a shipbuilder entered into contracts with the plaintiff whereby the plaintiff was engaged to carry out electrical and carpentry works for vessels built by the first defendant. It was later contended that the plaintiff had breached its contractual obligations under the contracts. The plaintiff sought to have the dispute referred to an arbitrator and served a notice to that effect on the first defendant. In the notice the plaintiff proposed that a senior member of the Johor Bar Committee be appointed as arbitrator. The first defendant informed the plaintiff that due to the highly technical nature of the contract, the arbitrator should have some experience and qualification to adjudicate the dispute between the parties. The plaintiff then filed an application to appoint its nominated arbitrator in the person of En Noordin bin Hussin, a senior member of the Johor Bar Committee, as the sole arbitrator to the dispute. The first defendant however proposed Germanisher Lloyd GLM Sdn Bhd, a classification society for vessels constructed in Malaysia or alternatively Samudra Sdn Bhd, a marine consultant — both providing arbitration services for disputes arising from maritime and shipbuilding contracts.

Held, dismissing the plaintiff's application and appointing Germanisher Lloyd GLM Sdn Bhd as an arbitrator:

(1) The plaintiff had failed to give proper notice to the first defendant as required under s 12 of the Arbitration Act 1952 ('the Act') which prescribes that 21 days notice must be given. Furthermore the notice did not request the first defendant to concur in the appointment of an arbitrator and even if it did, the notice was vague as it made reference to the appointment of a 'senior member of the Johor Bar Committee' as an arbitrator. The plaintiff also failed to inform the first defendant in the purported notice whether any of the 'senior members' of the Johor Bar Committee had consented to act as an arbitrator. Due to these inherent defects, it could not be said that the plaintiff had given notice to the first defendant to concur in the appointment of an arbitrator. Thus the plaintiff failed to give a proper notice to the first defendant within the ambit and scope of s 12 and this failure was fatal (see pp 628B–C, 628C–D, 629A);

(2) The plaintiff's application was premature as the court was not clothed with the necessary legal jurisdiction under s 12 of the Act to make the appointment. Furthermore, the plaintiff's application and the affidavits-in-support were fraught with irregularities (see pp 629A, 640C);

(3) To constitute an appointment the other party must be notified of the name of the person appointed and the arbitrator must have prior to that been notified of the nomination and consented to act as arbitrator (see p 629G–H);

(4) On the facts, it was imperative that the arbitrator possess some knowledge of the shipbuilding industry and familiar with the norms and trade practices prevalent in the industry in order to fully appreciate the parties' contractual obligations. The plaintiff here failed to illustrate by way of affidavit evidence that the proposed arbitrator had the relevant knowledge of the matters (see p 632D–E).

[Bahasa Malaysia summary

Defendan pertama, seorang pembuat kapal telah menyempurnakan kontrak-kontrak dengan plaintif di mana plaintif telah dilantik untuk menjalankan kerja-kerja elektrik dan pertukangan untuk kapal-kapal yang dibina oleh defendan pertama. Adalah ditegaskan kemudiannya bahawa plaitnif telah melanggar tanggungjawab kontraktualnya di bawah kontrak-kontrak tersebut. Plaintif telah memohon pertikaian tersebut dirujuk kepada seorang penimbangtara dan menyampaikan notis berkenaannya ke atas defendan pertama. Di dalam notis tersebut plaintif telah mencadangkan agar seorang ahli lama Jawatankuasa Peguam Johor dilantik sebagai penimbangtara. Defendan pertama memaklumkan plaintif bahawa disebabkan oleh sifat kontrak yang amat teknikal tersebut, penimbangtara tersebut hendaklah mempunyai sedikit pengalaman dan kelayakan untuk mengadili pertikaian antara pihak-pihak tersebut. Plaintif kemudiannya telah memfailkan satu permohonan untuk melantik penimbangtara yang dicalonkan olehnya iaitu En Noordin bin Hussin, seorang ahli lama Jawatankuasa Peguam Johor, sebagai penimbangtara tunggal kepada pertikaian tersebut. Defendan pertama bagaimanapun mencadangkan Germanisher Lloyd GLM Sdn Bhd, satu persatuan yang diklasifikasikan untuk kapal-kapal yang dibina di Malaysia atau secara alternatif Samudra Sdn Bhd, perunding marin — kedua-duanya memberikan khidmat timbangtara untuk pertikaian-pertikaian yang timbul daripada kontrak-kontrak samudera dan pembinaan kapal.

Diputuskan, menolak permohonan plaintif dan melantik Germanisher Lloyd GLM Sdn Bhd:

(1) Plaintif telah gagal untuk memberikan notis yang betul kepada defendan eprtamam sebagaiaman yang dikehendaki di bawah s 12

Akta Timbangtara 1952 ('Akta tersebut') yang memperuntukkan bahawa notis 21 hari perlu diberikan. Tambahan pula notis tersebut tidak meminta defendan pertama untuk bersetuju dengan pelantikan seorang penimbangtara dan walaupun telah bersetuju, notis tersebut adalah tidak terang keran ia membuat rujukan kepada pelantikan seorang 'ahli-ahli lama Jawatankuasa Peguam Johor' sebagai penimbangtara. Plaintif juga gagal untuk memaklumkan defendan pertama dalam notis tersebut sama ada mana-mana daripada 'ahli-ahli lama' Jawatankuasa Peguam Johor tersebut telah bersetuju untuk bertindak sebagai penimbangtara. Disebabkan oleh kecacatan-kecacatan yang sedia ada ini, ia tidak boleh dikatakan bahawa plaintif telah diberikan notis kepada defendan pertama untuk bersetuju dengan pelantikan seorang penimbangtara. Oleh itu plaintif telah gagal untuk memberikan notis yang betul kepada defendan pertma dalam lingkungan dan skop s 12 dan kegagaln ini membawa padah (lihat ms 628B–C, 628C–D, 629A).

(2) Permohonan plaintif adalah pra masa kerana mahkamah tidak dilengkapi dengan bidang kuasa yang diperlukan di bawah s 12 Akta tersebut untuk membuat pelantikan. Tambahan pula, permohonan plaintif dan afidavit-afidavit sokongan penuh dengan luar aturan (lihat ms 629A, 640C).

(3) Untuk membentuk satu pelantikan pihak yang satu lagi perlulah memberitahu nama orang yang dilantik dan penimbangtara tersebut perlulah sebelumnya diberitahu akan pencalonan tersebut dan bersetuju untuk bertindak sebagai penimbangtara (lihat ms 629G–H).

(4) Berdasarkan fakta-fakta berikut, adalah penting sekali agar penimbangtara tersebut memiliki sedikit pengetahuan industri pembinaan kapal dan biasa dengan norma-norma dan amalan-amalan dagangan yang tersebar luas dalam industri tersebut bagi tujuan memahami sepenuhnya tanggungjawab-tanggungjawab konraktual pihak-pihak berkenaan. Plaintif di sini telah gagal untuk menggambarkan melalui afidavit keterangan bahawa penimbangtara yang dicadangkan tersebut mempunyai pengetahuan relevan tentang perkara berkaitan (lihat ms 632D–E).]

Notes

For cases on appointment of arbitrator, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 892–896.

Cases referred to

Chio Tan Seng & Ors v Chong Chai Huat & Ors [1997] 4 CLJ 116 (refd)

Harihar Banerji & Ors v Ramshashi Roy & Ors AIR [1918] PC 102 (refd)

Hindustan Steel Works Construction Ltd v Chotanagpur Mining Corp AIR 1973 Pat 416, [1973] BLJR 678 (refd)
Ibrahim bin Mohamad v Ketua Polis Daerah Johor Bahru & Ors [1996] 5 MLJ 15 (refd)
Matte v The City of Vancouver [1917] 2 WWR 53 (refd)
Pando Compania Naviera SA v Filmo SAS [1975] 2 All ER 515 (refd)
Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 CLJ 321 (refd)
Rahcassi Shipping Co SA v Blue Star Line Ltd [1969] 1 QB 173 (refd)
State v DC Degara [1984] 58 Cut LT 643 (refd)
State of Orissa v Gangaram Chhpolia AIR 1982 Ori 277 (refd)
Sykt Islamiyah v Bank Bumiputra (M) Bhd [1988] 3 MLJ 218 (refd)
Taylor v Denny Mott & Dickson Ltd [1912] AC 666 (refd)
Tradax SA v Volkswagenwerk AG [1970] 1 QB 537 (refd)
Tradax SA v Volkswagenwerk AG [1969] 2 QB 599 (refd)
Voon Mow Chen v Menteri Dalam Negeri & Anor [1993] 2 AMR 38 (refd)
Wood Valance & Co, Re [1915] OWN 814 (refd)

Legislation referred to

Arbitration Act 1952, s 12, (a)

Badrol Hisham bin Mohd Sani (*M/s Zainal & Badrol*) for the plaintiff, *Clarence Edwin* (*Abdul Raman Saad & Associates*) for the first defendant.

Introduction

Abdul Malik Ishak J: This was an application by the plaintiff in encl 4 by way of an originating summons for the following prayers:

1 Noordin Bin Hussin seorang Peguambela dan Peguamcara di Mahkamah Tinggi Malaya di Johor Bahru beralamat di No: 40, Jalan Trus, 80000 Johor Bahru, Johor Darul Takzim dilantik sebagai Timbang-tara atau seorang lain yang sesuai dan sempurna untuk bertindak sebagai timbang-tara untuk mengadili pertikaian diantara Plaintif dengan Defendan Pertama berhubong dengan perjanjian-perjanjian bertarikh 29 June 1996 dan 21 July 1996;

2 Defendan Pertama sama ada bagi dirinya sendiri, ajen-ajen atau wakil-wakilnya ditahan, disekat atau dihalang melalui satu injuksi daripada menuntut atau menerima bayaran sebanyak RM29,822.50 atau apa-apa jumlah berhubong dengan Gerenti-gerenti Bank bernombor: 9904BGP248494 dan 99040BGP248495 sehingga selesainya perbicaraan dihadapan Timbangtara atau sehingga perintah selanjutnya;

3 Defendan Kedua sama ada bagi dirinya sendiri atau melalui ajen-ajen atau wakil-wakilnya dengan apa cara sekali-pun di halang atau disekat melalui satu injuksi daripada membayar wang sebanyak RM29,822.50 atau apa-apa jumlah berhubong dengan gerenti-gerenti bank bernombor: 9904BGP248494 dan 99040BGP248495 sehingga selesainya perbicaraan dihadapan Timbangtara atau sehingga perintah selanjutnya.

4 Kos permohonan ini dibayar oleh Defendan Pertama; dan

5 Lain-lain perintah yang difikirkan adil dan suai manfaat.

Enclosure 4 was dated 13 May 1998 and it was filed on the same date. In support of encl 4 was an affidavit affirmed by Jamaluddin bin Abd Manan on 13 May 1998 and filed on the same date and marked as encl 3. In reply to encl 3 would be the affidavit in reply of Manoel Francisco Avelino Gomes that was affirmed on 9 June 1998 and filed on 10 June 1998 as seen in encl 5. The reply to encl 5 was the affidavit of Jamaluddin bin Abd Manan affirmed on 19 June 1998 and filed on 20 June 1998 as seen in encl 8. The reply to encl 8 would be the thick affidavit of Manoel Francisco Avelino Gomes affirmed on 20 August 1998 and filed on 21 August 1998 as seen in encl 9. Jamaluddin bin Abd Manan affirmed an affidavit on 2 September 1998 which was filed on the next date and it was marked as encl 10 which served as a reply to encl 9. Finally, Manoel Francisco Avelino Gomes affirmed an affidavit on 22 September 1998 which was filed on 23 September 1998 and marked as encl 11 and this served as a reply to encl 10.

On 21 May 1998, all the parties appeared before me in chambers. Mr Badrol Hisham bin Mohd Sani, learned counsel for the plaintiff, magnanimously informed this court that the plaintiff was withdrawing their claim against the second defendant one Malayan Banking Berhad.

It was more in the nature of an oral application to withdraw the suit against Malayan Banking Berhad — the second defendant. Mr Clarence Edwin, learned counsel for the first defendant — Malaysia Shipyard and Engineering Sdn Bhd, and the second defendant as well naturally jumped with joy. Since both parties agreed that the case against the second defendant — Malayan Banking Berhad should be withdrawn, I made an order that the case against the second defendant be withdrawn as agreed between the parties with no order as to costs. This meant that prayers 2 and 3 of encl 4 will no longer be deliberated by this court and the focal attention of this court would be in regard to prayers 1, 4 and 5 of encl 4.

Prayer 1 of encl 4 was the plaintiff's application to appoint Mr Noordin bin Hussin, an advocate and solicitor, as an arbitrator in the dispute between the plaintiff and the first defendant — Malaysia Shipyard And Engineering Sdn Bhd. I will now endeavour to narrate the salient facts that gave rise to the application in encl 4.

Salient Facts

At all material times, the first defendant is engaged in a lucrative business venture that of a shipbuilder in the shipbuilding industry. It appeared that the first defendant had entered into four contracts with the plaintiff and under these contracts the plaintiff was assigned to perform certain electrical and carpentry works for vessels being built by the first defendant. The particulars of these contracts have been lucidly stated in para 8 of encl 9 and the contracts were also exhibited and marked as 'MFAG-1' in encl 9. Paragraph 8 of encl 9 was worded as follows:

> The plaintiff has entered four (4) contracts with the first defendant, particulars of which are as follows:

A (i) Contract No: 952071 (P6) Electrical & Electronic;

(ii) Contract No: 962073 (P4) Electrical;

(iii) Contract No: 962074/P6/Electrical & Electronic; and

(iv) Contract No: 962073/P3/Carpentry.

A copy each of the said contracts are annexed hereto and marked as exhibit
B 'MFAG-2'

Mr Clarence Edwin argued and contended that the plaintiff had breached its contractual obligations to the first defendant in that the plaintiff had abandoned work under Contract No: 952071 (P6) Electrical and Electronic resulting in a loss of RM241,455.05 to the first defendant who
C was compelled to expend the said sum to complete the work that was abandoned on the vessel. This was amply deposed in para 9 of encl 9. The first defendant thereafter refused to release any further monies to the plaintiff but proceeded to set off the monies owing to the plantiff for work done against the cost incurred by the first defendant to complete the abandoned works. This proved insufficient and the first defendant had no
D choice but to call the 'on demand' bank guarantees provided by the plaintiff to the first defendant pursuant to the terms and conditions of the contracts. The plaintiff denied that it had breached its contractual obligations to the first defendant and this was the unwavering stand of Mr Badrol Hisham bin Mohd Sani who acted zealously for the plaintiff. The plaintiff sought to have the dispute referred to an arbitrator and proposed that a senior member of
E the Johore Bar Committee in the person of Mr Noordin bin Hussin be appointed as arbitrator. The first defendant took exception and held the view, quite strongly, that the nature of the contract in the present case was highly technical. So technical that Mr Clarence Edwin submitted, with style, that the arbitrator must have some experience and qualification to
F enter the arena and adjudicata the dispute between the parties and so to avoid confusion the first defendant relayed their stand to the plantiff. It was for this reason that the plaintiff swiftly filed this application vide encl 4 to appoint its nominated arbitrator in the person of Mr Noordin bin Hussin as the sole arbitrator to the dispute between the parties.

G *The law in regard to the appointment of an Arbitrator by the Court*

It is ideal to refer to the relevant clause in the contract between the parties particularly cl 41 of contract no: 952071 (P6) Electrical & Electronic (exh 'MFAG-1' of encl 9) under column Arbitration. At para 46 of encl 9, the word 'Arbitration' is defined as:

H

> Arbitration
>
> Any difference or dispute arising between the Company and the Contractor shall be settled by negotiation. In the absence of such settlement, the dispute shall be finally settled by arbitration under the Laws of Malaysia in accordance with the provisions of the Malaysian Arbitration Act 1952 (revised 1972). The
I award of the Arbitration shall be final and binding on the Parties.

and a close perusal of it shows that it does not prescribe the number of arbitrators needed to be appointed in the event of a dispute. It is also ideal

and quite appropriate to fall back on the general provisions of the Arbitration Act 1952 particularly s 8 which enacts as follows:

> Arbitrators and Umpires
>
> 8 When reference is to a single arbitrator
>
> Unless a contrary intention is expressed therein, every arbitration agreement shall, if no other mode of reference is provided, be deemed to include a provision that the reference shall be to a single arbitrator.

Clearly therefore s 8 of the Arbitration Act 1952 enacts that a dispute between the parties is to be referred to a single arbitrator. But unfortunately, the parties here are at loggerheads. They are unable to concur and agree to the appointment of an arbitrator. By way of encl 4, the plaintiff craved this court (prayer 1) to appoint Mr Noordin bin Hussin, an advocate and solicitor, as an arbitrator to arbitrate the dispute between the parties. The first defendant in encl 5, para 5 proposed the following bodies to act as arbitrators and these bodies too have consented to act as arbitrators:

(a) Germahisher Lloyd GLM Sdn Bhd; and

(b) Samudra Sdn Bhd.

Since both parties do not see eye to eye in regard to the appointment of an arbitrator, s 12(a) of the Arbitration Act 1952 should be referred to and that section provides as follows:

> Power of High Court in certain cases to appoint an arbitrator or umpire
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> In any of the following cases:
>
> (a) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;
>
> (b) ...;
>
> (c) ...;
>
> (d) ...;
>
> any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within twenty-one clear days after the service of the notice, the High Court may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

The essential prerequisites to be satisfied before an application under s 12 of the Arbitration Act 1952 can be made are, firstly, there is a valid arbitration agreement, secondly, the agreement provides or is deemed to provide that reference shall be made to a single arbitrator, thirdly, that all the parties do not concur to the appointment of an arbitrator. Now, once these essential prerequisites have been fulfilled, a party to the arbitration agreement is entitled to serve the other party with a written notice to appoint an arbitrator within 21 days from the service of the notice. Perhaps, at this juncture, it is germane to refer to SD Singh's *Law of Arbitration*, (10th Ed) where at p 199 the learned author had this to say:

A To give jurisdiction to the Court to act under this section, it is essential that a notice be served upon the other parties (*Nalini Ranjan Guha v Union of India* AIR 1954 Cal 462) or the arbitrators (as the case may be). Unless the notice is served as required by this section and the other party or the arbitrators given an opportunity to concur in the appointment within the period of fifteen days, the Court will not be able to exercise jurisdiction under this section (*Thakur Dass v Ram Dass* AIR 1935 Lah 374; *Union of India v Mangaldas N Varma* AIR 1958 Mad 296).

B

Unless the party has served a written notice as per sub-s (1)(c) on the other party, the Court cannot proceed in terms of sub-s (2) (*Haryana State v Radhey Sham* (1993) 1 Pun LR 139).

C The learned author then proceeded to say at p 200, the following:

> The party to whom notice has been given must have clear fifteen days for concurring in the appointment or making the appointment (*Sukhamal Bansidhar v Babu Lal Kedia* AIR 1920 All 258; ILR 42 All 525; 18 ALJ 652).

D Further down the same page and spilling over to p 201, the learned author continued:

> Failure to give the requisite number of clear fifteen days for the appointment is fatal to the appointment of an arbitrator by the Court ... .

E What was the time span stipulated by the plaintiff in their notice through their solicitors to the first defendant's solicitors? It was within seven days. The notice was dated 30 March 1998 and it was worded thus (see exh 'D' of encl 3):

F

Zainal & Badrol
Advocates and Solicitors
Peguambela & Peguamcara

Your Ref: CE/MSE/M.42400-97
Our Ref: ZB/11-97/Lsy

Date: 30 March 1998

G

To,
Messrs Abdul Raman Saad & Associates,
Advocates and Solicitors,
Suite 12-02, Level 12, Menara Pelangi,
Jalan Kuning, Taman Pelangi,
80400 Johor Bahru.

Dear Sirs,

H

Re: Contract No 962073 (P3/carpentary P4/electrical) Claim against Malaysia Shipyard and Engineering Sdn Bhd For RM441,114.50

We refer to the above matter.

2 We are instructed that despite our client's endeavour to settle the above matter amicably, your client has failed to reply favourably.

I

3 In the circumstances, our clients (have) no alternative but to refer the dispute between your clients and our clients to an arbitrator for adjudication in accordance with s 54 of the general conditions of contract.

4 The arbitrator to be appointed is a senior member of the Johore Bar Committee. A

5 Kindly let us have your reply within seven (7) days from the date hereof.

Yours faithfully,

Sgd (Illegible) B
Zainal & Badrol

Statutorily speaking, the plaintiff has failed to give proper notice to the first defendant as required under s 12 of the Arbitration Act 1952 which section prescribes that 21 days notice must be given. Furthermore, the notice did not request the first defendant to concur in the appointment of an arbitrator C and even if it did, the notice can be said to be vague as it makes reference to the appointment of a senior member of the Johore Bar Committee as an arbitrator. One may ask this pertinent question: Who exactly in the Johore Bar Committee would be categorised as a senior member? To confound the matter further, the plaintiff failed to inform the first defendant in their purported notice whether any of the 'senior members' of the Johore Bar D Committee had consented to act as an arbitrator. In view of these inherent defects, it cannot be said that the plaintiff had given notice to the first defendant to concur in the appointment of an arbitrator. The crucial words in s 12 of the Arbitration Act 1952, namely '... to appoint or, ... concur in appointing, ...' had been explained by Lord Denning MR in *Tradax Export* E *SA v Volkswagenwerk AG* ('La Loma') [1970] 1 QB 537 (CA), particularly at p 544 in these words:

> So we have to decide: what is necessary to constitute the appointment of an arbitrator? I think the answer is this: First, it is necessary to tell the other side. That is plain from *Tew v Harris* [1847] 11 QB 7. Second, it is necessary to tell the appointee himself. That is obvious because he often has to start acting at F once. Third, it is necessary that he should be willing to act and have intimated his willingness to accept the appointment. In *Russell on Arbitration* (17th ed, 1963), at p 160, it is said: 'Acceptance of the office by the arbitrator appears to be necessary to perfect his appointment.' There is a passage in *Ringland v Lowndes* (1863) 15 CBNS 173 at p 196, which gives some support to that statement. G

It is pertinent to note that the English Court of Appeal in dismissing the appeal in the case of *Tradax Export SA v Volkswagenwerk AG* ('La Loma') held that the three requisites of an effective appointment of an arbitrator under the Centrocon arbitration clause were that within three months of final discharge there must be: (1) the designated arbitrator must be asked H whether he was willing to act in the particular manner; (2) he must consent so to act; and (3) his name and appointment must be communicated to the other side; and as two of those requirements had not been complied with within the stipulated time the charterers' claim was absolutely barred; a fortiori, where they could have applied for an extension of time on the ground of hardship under s 27 of the English Arbitration Act 1950, but had I elected to delay and proceed instead by way of originating summons on the point of law.

A In my judgment, the plaintiff failed to give a proper notice to the first defendant within the ambit and scope of s 12 of the Arbitration Act 1952. That failure was fatal. The plaintiff's application in encl 4 particularly for prayer (1) was premature as this court was not clothed with the necessary legal jurisdiction under s 12 of the Arbitration Act 1952 to make the appointment. The phrase '... to appoint or, ... concur in appointing, ...' B appearing in s 12 of the Arbitration Act 1952 as alluded to earlier, has, unfortunately, not been judicially considered and determined. Megaw J in the court of first instance in the case of *Tradax SA v Volkswagenwerk AG* [1969] 2 QB 599, whose decision was confirmed by the Court of Appeal, shed some light as to the meaning of the word 'appoint'. There Megaw J C dealt with an agreement that provided for the appointment of an arbitrator by each party and his Lordship had this to say at page 607 to 608 of the report:

> I pass to the other question, was Mr Chesterman 'appointed' by the charterers as their arbitrator for the purpose of this dispute with the owners before D 15 March 1964? The answer depends on the meaning of the word 'appointed' in the context of this clause. If it is sufficient, as the charterers contend, to constitute the appointment of an arbitrator by a party to a dispute that that party should have notified the other party to the dispute that he has nominated Mr X to act as arbitrator, then the charterers duly fulfilled the requirements of the clause. The owners contend that that is not sufficient. In order that an arbitrator may have been 'appointed' for the purposes of this clause, it is E necessary, they say, that, at least, there should have been a communication by the appointor to the intended appointee authorising him to act in respect of the particular dispute; and that there should have been an acceptance, or agreement to act, on the part of the intended appointee.
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> The word 'appoint' has many different meanings in different contexts. In F the context of this Centrocon arbitration clause, I am satisfied that 'appointed' connotes 'effectively appointed'. A mere nomination, unknown to the appointee, is not an 'appointment' of him. It does not become an 'appointment' merely by being communicated to the other side. It becomes an 'appointment' of him as arbitrator only when he is effectively in the position of an arbitrator, clothed with the duties and authority of such. That stage of effective appointment is not reached before he has been told that it is desired G to appoint him in a particular matter and he has indicated his willingness to act in that matter.

Megaw J's decision explicitly laid down the principle that to constitute an appointment, the other party must be notified of the name of the person appointed and the arbitrator must have prior to that been notified of the H nomination and had consented to act as an arbitrator. In similar vein, *Halsbury's Laws of England* (4th Ed) Vol 2, at para 568 said:

> Where an arbitration agreement provides for the appointment of an arbitrator by each of two or more parties, three separate conditions must be fulfilled before any appointment is valid: I
>
> (1) the arbitrator must be notified of the appointment;
>
> (2) he must consent to act; and

(3) his name and the fact of his appointment must be communicated to the other party (*Tew v Harris* (1847) 11 QB 7; *Thomas v Fredericks* (1847) 10 QB 775; *Tradax SA v Volkswagenwerk AG* [1969] 2 QB 599, [1969] 2 All ER 144; affd [1970] 1 QB 537, [1970] 1 All ER 420). A

In the case before me, the plaintiff in its purported notice under s 12 of the Arbitration Act 1952 did not name the arbitrator to be appointed nor indicate that that individual has consented to act as an arbitrator. For these very salient reasons, the plaintiff cannot now allege that the defendant had failed to '... appoint or, ... concur in appointing, ...' an arbitrator within the ambit, purport and scope of s 12 of the Arbitration Act 1952. Mr Clarence Edwin rightly argued that the plaintiff cannot seek an order of the court to appoint Mr Noordin bin Hussin as an arbitrator since the first defendant had not received any proposal from the plaintiff to appoint him and this meant that the first defendant had not failed to concur in the appointment of Mr Noordin bin Hussin within the meaning of s 12 of the Arbitration Act 1952. Undaunted, Mr Badrol Hisham bin Mohd Sani argued that the defects in the notice must be construed favourably and not with the desire to find fault in them as to render them defective. He relied on the latin phrase *ut res magis voleat quam pereat* and cited the case of *Harihar Banerji & Ors v Ramshashi Roy & Ors* AIR 1918 PC 102 (from Calcutta). The headnotes of that case bear repetition: B C D

> The principles governing the construction of a notice to quit laid down by English cases are equally applicable to cases arising in India and they establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances; and further, they are to be construed not with a desire to find fault in them which would render them defective but to be construed *ut res magis valeat quam pereat Doe d Huntingtower v Culliford* (1824) 4 Dow & Ry (KB) 248; *Doe d Williams v Smith* (1836) 5 Adrand E 350; *Wride v Dyer* (1900) 1 QB 23 applied. E F
>
> But these principles are applicable to notices containing mistakes honestly but inadvertently made and not to inaccuracies deliberately inserted for fraudulent purposes. G

With respect, having read the case of *Harihar Banerji*, I can safely say that that case are poles apart from the present case. The case of *Harihar Banerji* dealt with in acurracies or mistakes made in a notice to quit issued by the landlord to the tenant. The principle that can be distilled from *Harihar Banerji* would be that a notice to quit should not be strictly construed and the obvious reason being that the tenant should be well aware of the facts relating to the tenancy. In this regard, Lord Atkinson at p 104 of the report remarked that: H

> If they knew the law, as they must be assumed to do, they must have been well aware that a notice to quit calling upon the tenants of a holding to quit a portion of it is absolutely bad, and they must have known also that this design could not be accomplished unless the ejectment founded on the notice was so I

framed as to obtain secure possession of the portion mentioned in the notice and no more, and that the action could be at once defeated by the tenants by proof that the contents of their holding were more than the part named.

Clearly therefore the case of *Harihar Banerji* can easily be distinguished and for that reason irrelevant and immaterial for the present exercise.

That would be the end of the matter but for the sake of posterity, I will now proceed to the other points which would militate greatly against the plaintiff's proposal for the appointment of an arbitrator in the person of Mr Noordin bin Hussin. A caveat must be added. This judgment is not meant to cast a slur on the integrity and uprighteousness of Mr Noordin bin Hussin. This judgment revolves entirely on the interpretation of s 12 of the Arbitration Act 1952 and its ramifications. The professionalism of Mr Noordin bin Hussin is left intact unscathed, as it were, so to speak.

Who is a person qualified to be appointed as an arbitrator?

The focal point for the appointment of an arbitrator by the court involves an exercise of curial scrutiny. The court must examine the background and qualifications of the proposed arbitrator. The cases of *Hindustan Steel Works Construction Ltd v Chotanagpur Mining Corpn* AIR 1973 Pat 416, 1973 BLJR 678; *State v DC Degara* 1984 58 Cut LT 643; and *State of Orissa v Gangaram Chhapolia* AIR 1982 Ori 277, 1982 54 Cut LT 214 lay down one singular principle: that parties have to be heard not only regarding the appointment, but also the person to be appointed as arbitrator. Another case in point would be *Taylor v Denny, Mott & Dickson, Limited* [1912] AC 666, a decision of the House of Lords. There two arbitrators failed to appoint an umpire after having been given the power to do so. Viscount Haldane LC remarked in an application by one party to the contract for the appointment of an umpire at p 670 to p 671 of the report:

> In such a case it would seem right that the Court, which is to take the place of the arbitrators who cannot agree, should have at least the opportunity of bringing the arbitrators before it and ascertaining their views before making the appointment.

In resolving prayer (1) of encl 4, it is not a case of merely giving my stamp of approval to the individual proposed as an arbitrator by the plaintiff. My duty extends further as it is incumbent on my part to ascertain the views of the other party as regards that individual. Mr Noordin bin Hussin is that individual and he is an advocate and solicitor of the High Court of Malaya practising in Johore — a senior member of the bar. The first defendant as I said was not agreeable to the appointment of Mr Noordin bin Hussin as an arbitrator. At para 7 of encl 5, it was deposed:

> In reply to paras 9 and 10, I wish to state that the dispute between the plaintiff and defendant arises out of a shipbuilding sub-contract and as such is highly technical. The first defendant therefore does not agree to the appointment of a solicitor as arbitrator unless the solicitor is familiar with the field of shipbuilding contracts. Furthermore, the plaintiff has not shown any evidence that the person they are suggesting as arbitrator has actually consented to act as arbitrator.

At paras 12 and 13 of encl 9, the deponent said:

> 12 In reply to paras 13 to 15 of the said Affidavit, I wish to state that the agreement between the plaintiff and the 1st Defendant is a shipbuilding contract ie shipbuilding contract involving electrical and carpentary works for vessel. Although, at first sight, this could be seen as an ordinary contract, I firmly state that from my own experience in the shipbuilding field, it is not an ordinary contract but a technical one.
>
> 13 The contract between the plaintiff and the first defendant is not only technical but the nature of such contracts and accepted trade practices will be understood by somebody who has some background or knowledge in the shipbuilding field. Therefore, the first defendant does not agree to the arbitrator proposed by the plaintiff.

Thus, the stand of the first defendant was that only a person who has knowledge and experience in the shipbuilding industry would be a person qualified to act as an arbitrator. John J A Sharkey and John B Dorter in their book entitled *Commercial Arbitration* at p 53 listed, among others, the arbitrator's 'expertise and understanding' to be of paramount importance. Surely an expertise would be an ideal asset for an arbitrator to possess. Just imagine an arbitrator will have to peruse through technical documents in exh 'MFAG-1' of encl 9 at pp 59 to 67 and pp 80 to 87. Thus, it would be imperative that the arbitrator must possess at least some knowledge of the shipbuilding industry together with the norms and trade practices prevalent in the industry in order to fully appreciate the parties' contractual obligations. With respect, the plaintiff failed to illustrate by way of affidavit evidence that the proposed arbitrator in the person of Mr Noordin bin Hussin has all the prerequisite knowledge of the matters highlighted by me. Neither was there any affidavit evidence to show that the proposed arbitrator has in fact acted in other disputes as an arbitrator. Mr Clarence Edwin argued that if the proposed arbitrator has previously acted as an arbitrator, and is an arbitrator of some commercial standing, the first defendant might find it less objectionable to his appointment as an arbitrator in the present case. There is merit in this submission. As Thomas Hobbes 1588 to 1679 once said:

> And therefore it is a law of nature, that in every controversy, the parties thereto ought mutually to agree upon an arbitrator, whom they both shall trust: and mutually to covenant to stand to the sentence he shall give therein.

There was no trust on the part of the first defendant to the proposed arbitrator as proposed by the plaintiff. By way of a rebuttal, the plaintiff in encl 8 at paras 13 and 14 deposed through Jamaluddin bin Abd Manan to the effect that the issues involved in this case were not that technical to the extent that it cannot be understood by most persons. It was further deposed that their proposed arbitrator is an experienced advocate and solicitor and has a good reputation to maintain and would render fair and just decisions. As I said exh 'MFAG-1' of encl 9 involved technical issues. The first defendant's grouse with the plaintiff relates to the plaintiff's failure to complete the electrical and electronic works on the vessel. The plaintiff held an opposite view and argued that these works had been completed. Such

disputes would entail perusal of the technical specifications in the contract and this requires an expertise in the field of shipping matters. Such expertise can never be said to be possessed by the proposed arbitrator as there was no affidavit evidence to this effect.

At this juncture, it is instructive to cite the Indian case of *State of Orissa & Ors v Gangaram Chhapolia & Anor* AIR 1982 Ori 277 where RC Patnaik J observed at p 279 of the report:

> 5 There is considerable weight in the submissions made by the counsel for the petitioners, that there is no presumption that the panel submitted by the contractor is sacred and that submitted by the State is profane. The matter boils down to the selection of a person worthy of being appointed as arbitrator. The person should have reputation of possessing an unimpeachable integrity and probity and not be open to approach by any of the parties and shall not bear even remotely, a bias, prejudice, animosity towards any of the parties. In such a person can both the parties repose their trust and confidence. In a case where parties themselves have chosen a person as arbitrator, they being the best judges of the person, the presumption is that the selection was made upon consideration of the pros and cons. Not so in the case of an appointment by the court, where by reason of the fiction, the person appointed as arbitrator is deemed to be one chosen by the parties. The courts, therefore, must act in such a manner as the parties would be given a free choice.

Further down the same page of the same report, the learned judge continued:

> It does not seem from the order that a hearing was given to the parties and the pros and cons in regard to the suggestion were considered. The courts while selecting an arbitrator should bear in mind that the function is not just a routine function to be exercised casually or mechanically. Great stakes are very often involved and a correct adjudication is very much dependent on the person, more on his integrity though no less on his competency. The State is not a 'no party' before the law. Its exchequer is the exchequer of the people.

These passages in the judgment of the learned judge clearly set out two qualities which a proposed arbitrator should possess. Firstly, a track record of acting as an arbitrator and this track record made him out to be a fair and impartial arbitrator. Secondly, the proposed arbitrator must have some knowledge of the area of dispute between the parties.

As I said earlier, the first defendant proposed two bodies as arbitrators and Mr Clarence Edwin reiterated that they are reputable independent bodies in the shipbuilding industry. In the alternative, the first defendant suggested that the Regional Centre for Arbitration in Kuala Lumpur to be made the appointing body and according to Mr Clarence Edwin this essentially meant that an arbitrator attached to the Regional Centre would be appointed to act in the dispute. The plaintiff found these two bodies objectionable and allegations were made that these two bodies were parties having interests in the first defendant's company. These were bald and unsubstantiated allegations. On the contrary, encl 9 of para 15 revealed that Germanisher Lloyd GLM Sdn Bhd is a Classification Society for vessels constructed in Malaysia while Samudra Sdn Bhd is a marine consultant.

These two bodies were said to provide, as part of their services, arbitration for disputes arising from maritime and shipbuilding contracts. Without a doubt there were sufficient materials in the affidavit in encl 9 to conclude that the two bodies possess the necessary expertise to adjudicate the dispute between the parties.

By way of an analogy, it would be ideal to refer to the case of *Pando Compania Naviera SA v Filmo SAS* [1975] 2 All ER 515. In that case, there was a clause in a charterparty for disputes to be referred to arbitration and the clause provided that the arbitrators should be 'commercial men'. Donaldson J sitting alone in the Queen's Bench Division said at p 518, the following:

> The use of the words 'commercial men' would also exclude those whose experience is solely as practising members of the legal profession. Some of them can rightly be described as 'commercial lawyers', but whilst they serve the commercial world they are not of it. Mr Clyde was a commercial lawyer before he ceased to practise, but this fact cannot disqualify him from becoming a 'commercial man' thereafter if he would otherwise be qualified. In the end the crux of the matter is whether a whole-time professional maritime arbitrator is within the class of person to whom the parties to a charterparty must be deemed to be referring when they speak of 'commercial men'.
>
> The shipping and commodity trades of the world are unusual in that they do not regard litigation or arbitration with abhorrence. On the contrary, they regard it as a normal incident of commercial life — a civilised way of resolving the many differences of opinion which are bound to arise. Would that the same intelligent attitude were adopted within industry. As a result, a domestic arbitration service has grown up in London, which serves the shipping and commodity trades on a world-wide basis. I say 'domestic' because an important characteristic is that the arbitrators are not regarded as outsiders. As I said in *Myron (owners) v Tradax Export SA, Panama City RP* [1969] 2 All ER 1263 at p 1265; [1970] 1 QB 527 at p 532: 'A person who is actively engaged throughout all available working hours in maritime arbitrations is regarded in practice as being engaged in the shipping trade.' And I could well have added 'and in the commercial side of that trade'. I have no doubt that a member of the London Maritime Arbitrators Association practising as a full-time maritime arbitrator would be regarded by most shipowners and charterers throughout the world as a 'commercial man'. Accordingly Mr Clyde was qualified to be appointed an arbitrator under the arbitration clause contained in this charterparty. The fact that he had also had practical experience of another aspect of the commercial side of the shipping trade by virtue of having been a director of shipping companies merely reinforces this view.

Without a doubt *Pando Compania Naviera SA v Filmo SAS* can readily be distinguished on its facts with the present case. There is absolutely no presumption that the arbitrator should be a 'commercial man' in the present case and notwithstanding this glaring disparity and difference, the general principles enunciated in *Pando Compania Naviera SA v Filmo SAS* are germane and should be vigorously adopted to the factual matrix of the present case. That general principle as distilled from that case may be summarised as follows: That the maritime and shipping industry which

must necessarily include shipbuilding is an industry which requires arbitrators who are called upon to settle disputes between the parties to have knowledge and practical experience about the industry in question. The contractual clause in the present case is completely silent as to who would be suitably qualified to act as an arbitrator but notwithstanding this silence it can readily be implied that a person whose only experience is that of practising as an advocate and solicitor is excluded. Roskill J in *Rahcassi Shipping Co SA v Blue Star Line Ltd* [1969] 1 QB 173 in fine language had this to say of the phrase 'commercial men' at pp 180–181 of the report:

> Let me go back to the first of Mr Mustill's points, that the meaning of the phrase 'commercial men' is not susceptible of an accurate or intelligible construction. The practice of limiting the field of arbitrators in commercial disputes goes back a very long way. Cases under, for example, the Centrocon charterparty, London Corn Trade Association contracts and indeed under charterparties containing a provision that commercial men alone shall act as arbitrators or umpires, can be found in the books at least as far back as the turn of the century.
>
> I begin with a reference to *French Government v Tsurushima Maru (Owners)* (1921) 7 Ll LR 244; (1921) 8 Ll LR 143 at p 403, a case which is material in more respects than one for present purposes. Bray J, whose dissenting judgment was ultimately upheld (1921) 7 Ll LR 244 at p 247, gave the history of these commercial arbitrations. I will not read the facts. Bray J said:
>
> > '"Both these gentlemen" — that is, the arbitrator and umpire there concerned — 'had had very large experience. Mr Newsom stated that he had been in the shipping trade 48 years and had taken part in hundreds of arbitrations, sometimes as arbitrator and sometimes as umpire. Mr Temperley stated that he had been engaged as arbitrator or umpire in a great many commercial arbitrations during the last 20 years.'
>
> Forty-eight years from 1921 goes back to about 1870, and one can trace, through these cases, the practice of conducting commercial arbitrations in this way for nearly a century. Bankes LJ said:
>
> > 'The charter-party under which the vessel was chartered contained an arbitration clause providing that any dispute arising under the charter-party should be referred to arbitration in London, one arbitrator to be nominated by each side, and, in case the arbitrators did not agree, an umpire was to be appointed by them. It also said that the arbitrators, including the umpire, shall be commercial men. That language must have been adopted for a purpose. It declares that if a dispute arises it must be settled by commercial men, and I think at any rate one may infer that persons who enter into an agreement in that form contemplate that an arbitration may be held in which the strict rules of evidence may not be observed and in which the procedure required in an arbitration on strict legal principles may not be followed.'

and clearly what Bray J said in *French Government v Tsurushima Maru (Owners)* that both Mr Newsom and Mr Temperley had arbitration experiences for a prolonged period of time and they both served as arbitrators served as useful guidelines to be followed by this court. Here, there was not an iota of affidavit evidence to show that Mr Noordin bin

Hussin ever sat as an arbitrator in any arbitration proceeding. Comparatively, with respect, Mr Noordin bin Hussin can never be equated in terms of arbitration experiences with that of Mr Newsom or Mr Temperley. But I am not blaming Mr Noordin bin Hussin for his lack of arbitration experience. One thing is certain. I cannot conjecture that Mr Noordin bin Hussin has had arbitration experience because there was no supportive affidavit evidence in that direction.

I am aware of the innuendo in para 18 of encl 8 to the effect that the arbitrators proposed by the first defendant were said to be partial. I must at once point out that this innuendo has been adequately answered in para 17 of encl 9. Mr Clarence Edwin submitted that the plaintiff was adamant that Mr Noordin bin Hussin should arbitrate the dispute. Mr Clarence Edwin further submitted that the first defendant had provided the names of two independent bodies together with the Regional Centre for Arbitration in Kuala Lumpur as likely choices to be selected as an 'arbitrator'. These choices were, according to Mr Clarence Edwin, good ones, and he proceeded to point out that there were approximiately 7,000 lawyers in the country with some 900 lawyers practising in the State of Johore, yet the plaintiff felt that Mr Noordin bin Hussin was the best candidate for the job. Mr Clarence Edwin too submitted that there was no evidence that Mr Noordin bin Hussin is a member of the Johore Bar Committee notwithstanding the fact that the plaintiff's purported notice suggested the appointment of 'a senior member of the Johore Bar Committee'. All these points must surely be considered by me when deliberating encl 4 prayer (1) thereof. No stones were left unturned by both parties. Diligence was the order of the day.

I will now proceed to examine the technicalities raised by both parties.

Technical irregularities

(1) The plaintiff seeks to introduce an amendment to the prayers contained in encl 4. Mr Badrol Hisham bin Mohd. Sani sought to amend by substituting new prayers to encl 4 in the following words:

> With respect to prayers 2 and 3 of encl 4, the plaintiff apply to substitute the same with an order that the first defendant pays to the plaintiff or their solicitors the sum of RM29,822.50. This sum is related to 2 purported retention guarantees received by the first defendant from the second defendant after the commencement of this action.

Order 7 r 3(1) of the Rules of the High Court 1980 ('the RHC') states that:

> Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

and it clearly requires the plaintiff to state in their originating summons precisely the nature of the relief or remedy sought; a mandatory requirement since there is the use of the word 'must' which denotes a peremptory obligation placed on the plaintiff. It follows therefore that since the plaintiff did not state precisely the nature of the relief or remedy sought, then the plaintiff should make a formal application to this court for leave to amend the originating summons in encl 4. But alas, there was no such formal application. It must be borne in mind that the RHC is a complete set of rules and it is not devoid of procedure for an application of this nature to be made. Order 20 r 5(1) of the RHC provides that the plaintiff, if they wish to amend their originating process, should seek the leave of the court and leave may be granted by the court on such terms as to costs as may be just. Now, although O 20 r 5 of the RHC speaks of proceedings commenced by writ, the rule is equally applicable to proceedings begun by originating summons since O 20 r 7 of the RHC provides that:

> Rule 5 shall have effect in relation to an originating summons, a petition and an originating notice of motion as it has effect in relation to a writ.

Enclosure 4 was filed on 13 May 1998, and there was plenty of opportunity for the plaintiff to file a formal application for leave to amend their originating summons and yet the plaintiff saw it fit, for reasons only known to themselves, not to file a formal application under O 20 of the RHC. I reject outright the plaintiff's informal application.

(2) There were defects or irregularities in encls 3 and 8 particularly in regard to the exhibits annexed to these enclosures. These defects or irregularities were highlighted in the first defendant's affidavits particularly para 4 of encl 5 and para 5 of encl 9. These defects or irregularities may be stated as follows:

(a) The exhibits 'A' to 'G' of encl 3 have not been properly entitled.

(b) There is no exhibit 'B' to encl 3 as averred to in the affidavit.

(c) Exhibits 'JAM-1' and 'JAM-3' of encl 8 have been incorrectly placed and totally inconsistent with the references to them in the affidavit.

(d) Exhibits 'JAM-1', 'JAM-2', and 'JAM-3' of encl 8 are not properly entitled.

Order 41 r 11 of the RHC states as follows:

> 11 (1) Any document to be used in conjunction with an affidavit must be exhibited and a copy thereof annexed to the affidavit.
>
> (2) Any exhibit to an affidavit must be identified by a certificate of the person before whom the affidavit is sworn.
>
> The certificate must be entitled in the same manner as the affidavit and rule 1(1), (2) and (3) shall apply accordingly.

Again, the use of the word 'must' denotes a peremptory mandate as opposed to and in contra distinction to a mere direction or discretion. In short, the plaintiff has failed to observe the mandatory provisions of the RHC. Towards this end, Siti Norma Yaakob JCA in *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 CLJ 321 had occasion to put her alert and robust judicial mind and rightly interpreted the meaning of the word 'must' as opposed to the word 'may' in these words (see p 333 of the report):

> The word 'must' as opposed to 'may' is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word 'may' implies. We equate the meaning of the word 'must' as that given to the word 'shall' and for that reason the choice of the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise such a discretion.

Procedural requirements as prescribed in the RHC must be adhered to. The Court of Appeal in *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* categorically stated that the court is not empowered to exercise a discretionary power to excuse the irregularity. Here before me the plaintiff has committed a multitude of breaches. All the defects and irregularities were itemised in para 4 of encl 5 and para 5 of encl 9 and the plaintiff had ample notice of them, yet the plaintiff continued to flout the rules with impunity. I had occasion to say in *Ibrahim bin Mohamad v Ketua Polis Daerah Johor Bahru & Ors* [1996] 5 MLJ 15 particularly at pp 19 and 20 that:

> .... the RHC is not meant to decorate the pages of the RHC but rather it should be vigorously applied and obeyed. The Rules Committee must have devised the rules for the expeditious despatch of litigation and, consequently, the courts must simply not stand idle but instead rise up to the occasion and enforce it accordingly.

and the same case was also reported in another popular local law journal vide [1996] 2 AMR 1964. To waterdown the submission of Mr Clarence Edwin, Mr Badrol Hisham bin Mohd Sani referred to the case of *Syarikat Islamiyah v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 218 and argued that the defects or irregularities were cured by the filing of the plaintiff's corrective affidavit in encl 10 which were on all fours with encls 3 and 8. *Syarikat Islamiyah* was a case that dealt with an application under O 14 of the RHC which specifically prescribed the use of certain words to be stated in the affidavit supporting the application for summary judgment. The use of those words were merely superfluous and if the plaintiff through an oversight has failed to state that 'the defendant has no defence' to his claim, then according to Gunn Chit Tuan J (as he then was), the plaintiff could well file a supplementary affidavit to cure the minor defect. But here before me, the plaintiff has not filed affidavits which contain minor defects. On the contrary, the affidavits filed by the plaintiff are inherently defective since it contained the defects highlighted and illustrated earlier on in this judgment. Vincent Ng JC (now judge) in *Voon Mow Chen v Menteri Dalam Negeri & Anor* [1993] 2 AMR 2199 at pp 2205–2206 observed in regard to the

A gravity of any formal irregularities that appeared in an affidavit in these words:

> No application was made by Encik Noorbahari for an adjournment in order to file fresh corrected affidavits; and neither was any application made to the court under O 14 r 4 above. This court would have granted the former application but would have been less inclined to grant the latter, if made; especially in regard to the misplacement of the jurat. It is injudicious and against the interests of justice for courts not to make manifest through resolute measures, its views that it should not allow — through bad precedents — a situation to prevail, which permitted the pre-execution of jurats only as aforesaid, or to give occasion for doubt as to the identity of the jurats vis-a-vis the contents of the affidavits.

B

C As I said the plaintiff argued that a corrective affidavit had been filed in encl 10 but, in my judgment, encl 10 cannot be considered as a corrective affidavit because of the following reasons:

(1) Enclosure 10 is a reply to the affidavit in encl 9. Enclosure 10 is therefore not a corrective affidavit.

D

(2) Leave of the court was not sought or obtained by the plaintiff to file a corrective affidavit.

(3) Enclosure 10 is not and cannot be said to be on all fours with encls 3 and 8. A situation of a similar nature was considered by me in *Chio Tan Seng & Ors v Chong Chai Huat & Ors* [1997] 4 CLJ 116 and at p 144, I said the following:

E

> Chio Tan Seng swiftly affirmed an affidavit in encl 89 on 11 April 1997 and that affidavit was in the nature of a corrective affidavit-in-support of Chio Tan Seng's affidavit that was affirmed on 20 December 1996 (encl 5).

F And later at p 145, I concluded by saying:

> I have no hesitation in accepting encl 89 as its contents were on all fours with encl 5 except that it had a jurat.

Conversely, in this case I have no hesitation to rule that the purported corrective affidavit was defective and this meant that the defects and G irregularities remained on record and it must be read adversely against the plaintiff. The impugned exhibits in encls 3, 8, and 10 will be excluded from the court's consideration forthwith.

Costs

H Two things must be highlighted. Firstly, if I am minded to dismiss encl 4 prayer (1) thereof costs should rightly go to the first defendant. Secondly, if I am minded to appoint an arbitrator under s 12 of the Arbitration Act 1952 then I must take note of two very important decisions:

(a) Middleton J observed in *Re Wood Vallance & Co* [1915] OWN 814:

I

> Application is now made to me to appoint an arbitrator.
>
> Some discussion took place as to the capacity in which I was called upon to act. I am satisfied that I can act only as persona designata, and

that I should not enter upon any discussion of any of the questions arising between the parties, save that I should ascertain whether the condition precedent to the making of the appointment, namely, the existence of a dispute or difference with regard to any of the matters mentioned in the clause in question, has arisen.

(b) Hunter CJ in the case of *Matte v The City of Vancouver* (1917) WWR (Vol 2) 53 spoke on behalf of the Supreme Court in Chambers and his Lordship held that:

> a Judge of the Supreme Court in appointing an arbitrator acts as a persona designata, and has no jurisdiction under s 133, sub-s 9 of the Vancouver Incorporation Act to award costs.

Of course, if I am minded to appoint an arbitrator from the list as suggested by the first defendant, I would not make an order as to costs as I would be acting persona designata.

In my judgment, the plaintiff's application and the affidavits in support were fraught with irregularities. It was a vivid display of an utter lack of appreciation for the rules of procedure as set out in the RHC. The end results would be these:

(1) Prayer (1) of the plaintiff's encl 4 to be dismissed with costs.

(2) Pursuant to s 12 of the Arbitration Act 1952 read with prayer (5) of encl 4, I hereby appoint Germanisher Lloyd GLM Sdn Bhd as an arbitrator and there be no order as to costs.

Plaintiff's application dismissed and Germanisher Lloyd GLM Sdn Bhd appointed as an arbitrator.

Reported by Andrew Christopher Simon